

January 16, 2012

BY E-MAIL

Hon. Alison J. Nathan
United States District Judge
Southern District of New York
500 Pearl Street, Rm. 615
New York, New York 10007

**American Broadcasting Companies, Inc. et al. v. Aereo, Inc.,
12 CV 1540 (S.D.N.Y.) (AJN)**

Dear Judge Nathan:

The ABC Plaintiffs agree with the central point made in the WNET Plaintiffs' January 16, 2013 letter: Fact discovery cannot be completed in the next five weeks. They continue to believe, however, that it makes much more sense for the Court to stay this matter until May 15, 2013, rather than extend the current fact discovery deadline until that date.

As the Court may recall, at the September 19, 2012 conference, the ABC Plaintiffs expressed their view, given the Second Circuit's expedited treatment of the appeal in this matter, that it made more sense to defer the costs and burdens of discovery until after the Second Circuit ruled. 9/19/12 Tr. 14:19-16:13. The Court's decision not to adopt that approach was driven, in large part, by what was, at that time, complete uncertainty as to how long it might be before (a) argument was held and (b) a decision issued. *Id.* 14:12-18; 47:19-22.

Part of that uncertainty has been eliminated since September. On October 4, 2012 (almost a month before briefing of the appeal even had been completed), the Second Circuit underscored its decision to treat the appeal expeditiously by setting November 30, 2012 as the argument date. 12-2807-cv, 2d Cir., Dkt. 141. (A copy of the transcript of that argument is attached.) It also is worth noting that in the somewhat similar *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012) matter, the Second Circuit issued its decision 89 days after argument – in a non-expedited appeal. Moreover, Judges Chin and Droney, two members of the *ivi* panel, also heard the appeal in this matter, along with Judge Gleeson of the Eastern District of New York. Finally, the Second Circuit's docket shows this Panel already has ruled in three other matters argued that day. Summary Order, *Woodard v. Shanley*, No. 12-361-pr, 2012 WL 6176756 (2d Cir. Dec. 12, 2012); Summary Order, *United States v. Alhakk*, No. 12-155-cr, 2012 WL 6176742 (2d Cir. Dec. 12, 2012); Summary Order, *United States v. Marimon*, No. 11-4921-cr, 2012 WL 6720523 (2d Cir. Dec. 28, 2012).

Regardless of the exact date by which the Second Circuit rules, there is no disputing its decision – however it comes out – will shape the scope of discovery in this case – perhaps eliminating the need for it entirely. For the reasons set forth in your decision, *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 397-402 (S.D.N.Y. 2012), all of the Plaintiffs still continue to suffer irreparable harm. Nonetheless, the ABC Plaintiffs do not believe that, at this point, a 120-day stay until May 15, 2013 will seriously exacerbate the harm suffered to date. Despite claiming it will expand nationwide, Aereo continues to retransmit broadcast television programs from New York City stations only.

In addition to these practical reasons for a short stay of this action until May 15, 2013, there is the additional benefit of avoiding the contentious back and forth on the merits of the discovery disputes that have arisen. The ABC Plaintiffs completely agree with the WNET Plaintiffs that Aereo appears to have adopted a strategy of seeking to penalize Plaintiffs for having sought to protect their copyrights with overly broad and burdensome requests. One example of its unprecedented and extraordinarily burdensome approach was Aereo's insistence on a privilege log that would have required logging of even purely internal communications of *any* outside counsel who *ever* has represented *any* of the Plaintiffs or provided advice or analysis with respect to "Aereo and/or similar technologies (e.g., RS-DVRs, TiVo, DVRs, etc)." 1/11/13 Order, 12 Civ. 1540, Dkt. 158, at 3 (noting such a requirement would be "immensely burdensome"). Another is its 92 post-preliminary injunction document requests. By contrast, the two groups of Plaintiffs, pre- and post-preliminary injunction combined, have requested altogether about only two dozen different categories of documents. The WNET Plaintiffs' letter dated January 16 catalogues the other discovery issues in detail, and, of course, Aereo has its own views on the matter. A short stay avoids the need for the Court to sort through these disputes and allows time for the Second Circuit to rule and guide the scope of further discovery, if any, as this matter proceeds.

Respectfully submitted,



Bruce P. Keller

cc: All Counsel of Record

Attachment

In The Matter Of:

WNET, THIRTEEN, et al.

v.

AEREO, INC., F/K/A BAMBOOM LABS, INC.

HEARING - Vol. 1

November 30, 2012

MERRILL CORPORATION

Legalink, Inc.

179 Lincoln Street
Suite 401
Boston, MA 02110
Phone: 617.542.0039
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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WNET, THIRTEEN, FOX TELEVISION
STATIONS, INC., TWENTIETH CENTURY FOX
FILM CORPORATION, WPIX, INC., UNIVISION
TELEVISION GROUP, INC., THE UNIVISION
NETWORK LIMITED PARTNERSHIP, AND PUBLIC
BROADCASTING SERVICE,

Plaintiffs-Counter-Defendants-
Appellants,

v. 12-12786-cv

AEREO, INC., F/K/A BAMBOOM LABS, INC.

Defendant-Counter-Claimant-Appellee.

-----X

AMERICAN BROADCASTING COMPANIES, INC.,
DISNEY ENTERPRISES, INC., CBS
BROADCASTING INC., CBS STUDIOS INC.,
NBCUNIVERSAL MEDIA, LLC, NBC STUDIOS,
LLC, UNIVERSAL NETWORK TELEVISION, LLC,
TELEMUNDO NETWORK GROUP, LLC AND
WNJU-TV BROADCASTING, LLC,

Plaintiffs-Counter-Defendants-
Appellants,

v. 12-2807-cv

AEREO, INC.,

Defendant-Counter-Claimant-Appellee.

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November 30, 2012

500 Pearl Street
New York, New York

<p style="text-align: right;">Page 2</p> <p>1</p> <p>2</p> <p>3</p> <p>4 B E F O R E:</p> <p>5 JUDGE DENNIS CHIN</p> <p>6 JUDGE CHRISTOPHER DRONEY</p> <p>7 JUDGE JOHN GLEESON</p> <p>8</p> <p>9</p> <p>10 ERIC J. FINZ, Hearing Reporter</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15 P A R T I E S:</p> <p>16 PAUL M. SMITH, ESQ.</p> <p>17 BRUCE P. KELLER, ESQ.</p> <p>18 R. DAVID HOSP, ESQ.</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 PROCEEDINGS</p> <p>2 exempt from the rule barring</p> <p>3 unlicensed retransmission services,</p> <p>4 primarily arguing that this court</p> <p>5 in Cablevision carved out an</p> <p>6 exception to the rule whenever the</p> <p>7 unlicensed retransmission service</p> <p>8 takes the trouble to pause and make</p> <p>9 a copy of the program, interposing</p> <p>10 that in the screen before sending</p> <p>11 it on to each individual</p> <p>12 subscriber.</p> <p>13 It also seems to argue that</p> <p>14 it's not really a retransmission</p> <p>15 service at all and it is instead a</p> <p>16 provider of access to equipment</p> <p>17 that it leases to subscribers who</p> <p>18 them use it themselves.</p> <p>19 Neither of these arguments has</p> <p>20 my basis in the statute. Indeed,</p> <p>21 if accepted, either of them would</p> <p>22 effectively overrule Congress's</p> <p>23 determination in 1976 that people</p> <p>24 should not be able to profiteer</p> <p>25 from broadcast television</p>
<p style="text-align: right;">Page 3</p> <p>1 PROCEEDINGS</p> <p>2 JUDGE CHIN: We have sitting</p> <p>3 with us again today Judge Gleeson</p> <p>4 from the Eastern District of New</p> <p>5 York, and we are grateful for his</p> <p>6 assistance.</p> <p>7 I understand that everyone is</p> <p>8 here. Accordingly, we'll hear the</p> <p>9 first cases in tandem.</p> <p>10 MR. SMITH: Good morning, your</p> <p>11 Honors, I'm Paul Smith,</p> <p>12 representing the WNET appellants in</p> <p>13 this case.</p> <p>14 Congress in the 1976 Copyright</p> <p>15 Act overruled the Supreme Court and</p> <p>16 provided services that retransmits</p> <p>17 broadcast television programs to</p> <p>18 subscribers is engaging in public</p> <p>19 performance of those programs and</p> <p>20 needs a license to retransmit.</p> <p>21 Aereo is a business that</p> <p>22 receives and retransmits broadcast</p> <p>23 television programming over the</p> <p>24 internet to its subscribers for a</p> <p>25 fee. It nevertheless claims to be</p>	<p style="text-align: right;">Page 5</p> <p>1 PROCEEDINGS</p> <p>2 programming by retransmitting it</p> <p>3 for a fee to their subscribers.</p> <p>4 The regime that existed before the</p> <p>5 '76 Act under Fortnightly and</p> <p>6 Teleprompter would be restored.</p> <p>7 Now, regarding Cablevision, I</p> <p>8 think it's important to understand,</p> <p>9 and focus on the fact that the</p> <p>10 issue before the court there was</p> <p>11 very different from the one here.</p> <p>12 What you had there was a licensed</p> <p>13 retransmission service, not an</p> <p>14 unlicensed retransmission service.</p> <p>15 Cablevision was a cable company, so</p> <p>16 it had a license to do the straight</p> <p>17 through transmissions of all the</p> <p>18 programs. And the only issue</p> <p>19 before the court was whether it</p> <p>20 needed a second license when it was</p> <p>21 providing the DVR functionality not</p> <p>22 at the set top, but at the server</p> <p>23 level.</p> <p>24 And the court came to the</p> <p>25 conclusion that if you focus just</p>

2 (Pages 2 to 5)

<p style="text-align: right;">Page 6</p> <p>1 PROCEEDINGS</p> <p>2 on that single transmission from</p> <p>3 the personalized copy to the</p> <p>4 subscriber, to the individual</p> <p>5 subscriber assigned to that copy,</p> <p>6 that that could be viewed as a</p> <p>7 private transmission rather than a</p> <p>8 public transmission, or private</p> <p>9 performance rather than a public</p> <p>10 performance.</p> <p>11 But that case is different</p> <p>12 from this one because what you're</p> <p>13 dealing with here is an entirely</p> <p>14 unlicensed service, so everything</p> <p>15 Aereo does is unlicensed, from the</p> <p>16 moment it receives the programming</p> <p>17 over its antennas, the</p> <p>18 transmissions it makes from its</p> <p>19 antennas to its servers, where the</p> <p>20 programming is processed into</p> <p>21 internet format.</p> <p>22 JUDGE DRONEY: How does that</p> <p>23 matter whether it's a public</p> <p>24 performance or not?</p> <p>25 MR. SMITH: Your Honor, once</p>	<p style="text-align: right;">Page 8</p> <p>1 PROCEEDINGS</p> <p>2 about.</p> <p>3 After all, there was no issue</p> <p>4 about the other transmissions that</p> <p>5 were being made by Cablevision or</p> <p>6 their receipt of the broadcast</p> <p>7 programming or anything else, it</p> <p>8 was just focused on that last</p> <p>9 transmission.</p> <p>10 And so the effect of allowing</p> <p>11 Cablevision to morph into a</p> <p>12 decision that authorizes what Aereo</p> <p>13 does of course would be to mean</p> <p>14 that everybody can engage in</p> <p>15 license-free retransmission.</p> <p>16 Because in current technology, it's</p> <p>17 virtually cost-free to put these</p> <p>18 copies of the stream and therefore</p> <p>19 there would be a whole regime of</p> <p>20 how television is delivered to</p> <p>21 people over cable, over satellite,</p> <p>22 with retransmission consent, with</p> <p>23 license fees that are paid, that</p> <p>24 whole thing --</p> <p>25 JUDGE CHIN: What about the</p>
<p style="text-align: right;">Page 7</p> <p>1 PROCEEDINGS</p> <p>2 you start looking at the entire</p> <p>3 service and everything it does,</p> <p>4 including the servers that all the</p> <p>5 subscribers share, the antennas</p> <p>6 that are used, the wires over which</p> <p>7 the signal goes before there is</p> <p>8 even a copy made, then I think the</p> <p>9 picture looks very different.</p> <p>10 And the fact that at some</p> <p>11 point in that process they</p> <p>12 interpose a copy and then send it</p> <p>13 on doesn't mean that their entire</p> <p>14 service becomes a private</p> <p>15 transmission.</p> <p>16 JUDGE DRONEY: How does the</p> <p>17 fact of a license matter?</p> <p>18 MR. SMITH: Well, the license</p> <p>19 was what confined the attention of</p> <p>20 the Cablevision panel just to the</p> <p>21 final end of the transmission.</p> <p>22 JUDGE DRONEY: Is that the</p> <p>23 basis for its decision?</p> <p>24 MR. SMITH: I think it is.</p> <p>25 That's what they were talking</p>	<p style="text-align: right;">Page 9</p> <p>1 PROCEEDINGS</p> <p>2 argument that Aereo is simply just</p> <p>3 providing the equipment that</p> <p>4 arguably as a technological matter</p> <p>5 you could take these little</p> <p>6 antennas and put them on to your</p> <p>7 home computer and accomplish the</p> <p>8 same thing, would that make it</p> <p>9 closer to Cablevision?</p> <p>10 MR. SMITH: Your Honor, the</p> <p>11 notion that you can be a service</p> <p>12 that serves multiple people and</p> <p>13 provide some access to distant</p> <p>14 programming like this and still say</p> <p>15 all you are is an equipment</p> <p>16 provider, that argument first was</p> <p>17 overruled by Congress.</p> <p>18 That's essentially what the</p> <p>19 cable companies argued in</p> <p>20 Fortnightly and in Teleprompter,</p> <p>21 that they were just facilitating</p> <p>22 the subscribers' receipt of</p> <p>23 television over antennas, and that</p> <p>24 they were not themselves engaged in</p> <p>25 any kind of performance.</p>

3 (Pages 6 to 9)

<p style="text-align: right;">Page 10</p> <p>1 PROCEEDINGS</p> <p>2 And the Congress said no, you</p> <p>3 are not, you're a service that is</p> <p>4 performing the shows, when you take</p> <p>5 it in on your antenna and send it</p> <p>6 on.</p> <p>7 And the fact that there are</p> <p>8 individual antennas can't change</p> <p>9 that analysis. First of all, in</p> <p>10 the Transmit Clause Congress was as</p> <p>11 broad as it possibly could be, said</p> <p>12 any device or process that involves</p> <p>13 transmitting programs on to</p> <p>14 subscribers.</p> <p>15 JUDGE DRONEY: How about the</p> <p>16 unique copies, isn't each recipient</p> <p>17 of the Aereo service getting a</p> <p>18 unique copy?</p> <p>19 MR. SMITH: There is a copy</p> <p>20 that's created in the stream of</p> <p>21 transmission.</p> <p>22 JUDGE DRONEY: For each</p> <p>23 individual; right?</p> <p>24 MR. SMITH: Yes, that's the</p> <p>25 legal issue we're presented with,</p>	<p style="text-align: right;">Page 12</p> <p>1 PROCEEDINGS</p> <p>2 and send it on, including live,</p> <p>3 effectively, so that the copy isn't</p> <p>4 even perceptible to the user, well,</p> <p>5 that's a very different</p> <p>6 proposition. It takes Cablevision</p> <p>7 and turns it into a complete carte</p> <p>8 blanche for people to abuse the</p> <p>9 copyright.</p> <p>10 JUDGE GLEESON: Are you</p> <p>11 familiar with the device called the</p> <p>12 Slingbox?</p> <p>13 MR. SMITH: I am, your Honor,</p> <p>14 yes.</p> <p>15 JUDGE GLEESON: Now, if I were</p> <p>16 able to afford one, it would allow</p> <p>17 me to be able to take a broadcast</p> <p>18 and convert it something on my</p> <p>19 laptop.</p> <p>20 MR. SMITH: It would allow you</p> <p>21 to take a broadcast and send it on</p> <p>22 to the internet to one of your</p> <p>23 devices, yes.</p> <p>24 JUDGE GLEESON: That wouldn't</p> <p>25 be a public performance, my viewing</p>
<p style="text-align: right;">Page 11</p> <p>1 PROCEEDINGS</p> <p>2 whether that can change the</p> <p>3 analysis.</p> <p>4 As a practical matter what</p> <p>5 that would mean if it does change</p> <p>6 the analysis is that Congress's</p> <p>7 determination in 1976 is overruled;</p> <p>8 there will be no more licensing of</p> <p>9 retransmission services because</p> <p>10 everyone will start doing it.</p> <p>11 JUDGE DRONEY: Wasn't that the</p> <p>12 basis of the Cablevision decision,</p> <p>13 that each was a unique copy</p> <p>14 thereto?</p> <p>15 MR. SMITH: In that particular</p> <p>16 context where all they were</p> <p>17 focusing on was that one</p> <p>18 transmission from that copy that</p> <p>19 had been created adjunct to a</p> <p>20 licensed service. But if you're</p> <p>21 going to allow them to do</p> <p>22 everything that a retransmission</p> <p>23 service does, from taking it in on</p> <p>24 antennas, processing it, having the</p> <p>25 website where people order it up</p>	<p style="text-align: right;">Page 13</p> <p>1 PROCEEDINGS</p> <p>2 of it on my laptop would not be a</p> <p>3 public performance?</p> <p>4 MR. SMITH: The use of a</p> <p>5 Slingbox may or may not involve</p> <p>6 some copyright infringement. It</p> <p>7 would not be a public performance,</p> <p>8 that's correct.</p> <p>9 JUDGE GLEESON: The potential</p> <p>10 audience is just me.</p> <p>11 MR. SMITH: That's correct.</p> <p>12 JUDGE GLEESON: Your argument</p> <p>13 I don't think takes sufficient</p> <p>14 account of the fact that</p> <p>15 Cablevision is part of the</p> <p>16 landscape. And once you take that</p> <p>17 kind of Slingbox phenomenon and</p> <p>18 then push it back upstream and have</p> <p>19 it be provided, here by Aereo, in</p> <p>20 just the same way that Cablevision</p> <p>21 provided the DVD function, it sure</p> <p>22 looks like you've got a problem</p> <p>23 with the Cablevision case.</p> <p>24 MR. SMITH: But again, your</p> <p>25 Honor, even before, before you get</p>

4 (Pages 10 to 13)

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1 PROCEEDINGS
2 to the creation of the copy and the
3 sending it out over the internet,
4 there is a lot of things that
5 Aereo's already done, including
6 transmissions inside its own
7 facility to get the thing to the
8 server where it's converted into
9 internet format.
10 And all of those things exist
11 separate and apart from any copy
12 that is made, and are not
13 individualized in the same way,
14 there is no preceding copy.
15 JUDGE GLEESON: But before it
16 goes to one of its subscribers, is
17 an individualized copy made with a
18 separate hard drive allocable to
19 that subscriber?
20 MR. SMITH: That's correct,
21 yes.
22 And the legal question is
23 whether you're going to read that
24 in light of the statute. The
25 statute, after all, makes it

Page 15

1 PROCEEDINGS
2 perfectly clear that Congress
3 intended to cover this --
4 JUDGE GLEESON: I get your
5 argument.
6 Can we do this consistent with
7 Cablevision?
8 MR. SMITH: I think this is an
9 important element of how far
10 decisis works. If you have a
11 statutory interpretation by a prior
12 panel that includes some language
13 that covers lots of different other
14 factual situations, that when you
15 get to those other factual
16 situations, and it's perfectly
17 evident that to apply that broad
18 language to those situations you
19 would be acting inconsistent with
20 the statute, then that broad
21 language becomes dictum to the
22 extent it applies to these other
23 fact situations.
24 I don't think a panel can bind
25 subsequent panels with respect to

Page 16

1 PROCEEDINGS
2 factual situations entirely
3 different from the one before the
4 court.
5 As the fly on the wall put it,
6 it's actually inadequate, the
7 precedent has to be viewed in light
8 of the facts before the panel.
9 Otherwise you say well, you have to
10 follow the law. But the law here
11 is a statute. And Congress could
12 not have been more clear that it
13 intended not to allow people to
14 engage in retransmission businesses
15 of this kind.
16 Now, they didn't anticipate
17 specific individual copies because
18 this was 1976, but they did say
19 whether it's live or time delayed,
20 it doesn't matter whether it's
21 individual streams, it doesn't
22 matter whether it goes at the same
23 time or different times, same
24 places, different places, any
25 device or process, legislative

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1 PROCEEDINGS
2 history says we're trying to be as
3 absolutely broad as we can because
4 of the kinds of technological
5 advances that are coming, we still
6 want retransmission has to be
7 something that you need to pay for.
8 Because you're profiteering on
9 somebody else's property.
10 So if this panel says we are
11 bound by this language that was
12 applied to a completely different
13 fact situation, then what you're
14 doing is you're following, I would
15 submit, is dictum, to the extent
16 that that broad language is applied
17 here in this context, you're
18 feeling as if you're bound by
19 something that that panel did not
20 have the authority to bind you on,
21 because they did not have these
22 facts before them at that time.
23 JUDGE CHIN: You have some
24 rebuttal time. We'll hear from
25 your colleague, Mr. Keller.

<p style="text-align: right;">Page 18</p> <p>1 PROCEEDINGS</p> <p>2 MR. SMITH: I appreciate it,</p> <p>3 your Honor. Thank you.</p> <p>4 MR. KELLER: May it please the</p> <p>5 court, I'm Bruce Keller, I</p> <p>6 represent the ABC parties in 2807.</p> <p>7 I have three points to make</p> <p>8 that I hope you'll find complement</p> <p>9 those made by Mr. Smith. The first</p> <p>10 is about the Transmit Clause, it's</p> <p>11 foundational in nature. The second</p> <p>12 is about Cablevision, it's</p> <p>13 interpretive, I think those are</p> <p>14 some of the questions Judge Gleeson</p> <p>15 was asking. And the third is about</p> <p>16 Aereo, and it's based on the</p> <p>17 record.</p> <p>18 The Transmit Clause point is</p> <p>19 really this: When Congress enacted</p> <p>20 the Transmit Clause it was</p> <p>21 declaring to businesses that</p> <p>22 publicly performed copyrighted</p> <p>23 works are infringing, and if they</p> <p>24 make their customers capable of</p> <p>25 receiving transmissions or</p>	<p style="text-align: right;">Page 20</p> <p>1 PROCEEDINGS</p> <p>2 do for themselves, that's not a</p> <p>3 performance. Congress said it is a</p> <p>4 performance and if you do it for</p> <p>5 all of your paying subscribers,</p> <p>6 that's a public performance.</p> <p>7 In other words, the stand in</p> <p>8 the shoes of the consumer defense</p> <p>9 was rejected through the new</p> <p>10 Transmit Clause, that's what</p> <p>11 Kirkwood/Infinity Broadcasting so</p> <p>12 holds at pages 108 and 112.</p> <p>13 The second point is that</p> <p>14 Cablevision did not change that</p> <p>15 Transmit Clause jurisprudence.</p> <p>16 And here's why: The Cablevision</p> <p>17 panel concluded that the RSDVR</p> <p>18 service before it was a storage</p> <p>19 service, not a retransmission</p> <p>20 service. It was not a</p> <p>21 retransmission of performances.</p> <p>22 And that's why the unique</p> <p>23 copies that they found meaningful</p> <p>24 there don't make a difference here.</p> <p>25 In that remote storage DVR case,</p>
<p style="text-align: right;">Page 19</p> <p>1 PROCEEDINGS</p> <p>2 retransmissions of copyrighted</p> <p>3 performances, regardless of the</p> <p>4 technology, that business is being</p> <p>5 outlawed.</p> <p>6 And at the core of the</p> <p>7 Transmit Clause are services that</p> <p>8 retransmit over-the-air radio or</p> <p>9 television broadcasts. Every case</p> <p>10 that has addressed a retransmission</p> <p>11 of either a radio or television</p> <p>12 broadcast has concluded it's a</p> <p>13 violation of the Transmit Clause.</p> <p>14 Legislative history is clear on</p> <p>15 that, the Kirkwood case, the</p> <p>16 FineTime 24 case from this circuit</p> <p>17 is clear on that.</p> <p>18 And to make sure that</p> <p>19 retransmitters are swept up within</p> <p>20 the Transmit Clause, Congress</p> <p>21 instructed courts to reject the</p> <p>22 1960s era defense that if all we do</p> <p>23 is enable someone who otherwise</p> <p>24 could receive that performance, if</p> <p>25 we just facilitate what they could</p>	<p style="text-align: right;">Page 21</p> <p>1 PROCEEDINGS</p> <p>2 you could not, for example, watch</p> <p>3 the Super Bowl --</p> <p>4 JUDGE CHIN: There is a</p> <p>5 storage aspect to the Aereo system?</p> <p>6 MR. KELLER: There is a</p> <p>7 storage aspect to the Aereo system,</p> <p>8 it is one that they downplay to the</p> <p>9 virtual exclusion of their</p> <p>10 retransmission service.</p> <p>11 And it is absolutely clear</p> <p>12 from their own advertising and from</p> <p>13 the record that they enable their</p> <p>14 subscribers to watch the Super Bowl</p> <p>15 as it is broadcast.</p> <p>16 JUDGE GLEESON: But even in</p> <p>17 the watch mode they can stop, they</p> <p>18 can pause, rewind. Correct?</p> <p>19 MR. KELLER: Yes, that is</p> <p>20 true.</p> <p>21 But the Transmit Clause says</p> <p>22 it doesn't matter when a</p> <p>23 subscriber, how a user watches a</p> <p>24 program, we're concerned with</p> <p>25 whether a retransmitter is</p>

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<p style="text-align: right;">Page 22</p> <p>1 PROCEEDINGS</p> <p>2 retransmitting that program.</p> <p>3 And the difference between</p> <p>4 Cablevision and Aereo in this</p> <p>5 regard is crisp. You could not</p> <p>6 watch the Super Bowl in real-time</p> <p>7 as a retransmission of a</p> <p>8 copyrighted performance through the</p> <p>9 RSDVR service.</p> <p>10 JUDGE GLEESON: How about my</p> <p>11 Slingbox example, they can, and</p> <p>12 that's not a public performance,</p> <p>13 right?</p> <p>14 MR. KELLER: So I took your</p> <p>15 point about the private nature of</p> <p>16 Slingbox. I think Mr. Smith made</p> <p>17 clear it's not been tested yet,</p> <p>18 there is no precedent, there is no</p> <p>19 court ruling on it.</p> <p>20 JUDGE GLEESON: It's hard to</p> <p>21 figure why any precedent would be</p> <p>22 construed in such a way to render</p> <p>23 that a public performance.</p> <p>24 MR. KELLER: I'm not arguing</p> <p>25 whether it is or it isn't.</p>	<p style="text-align: right;">Page 24</p> <p>1 PROCEEDINGS</p> <p>2 opinion --</p> <p>3 JUDGE CHIN: With a Slingbox</p> <p>4 you're getting a transmission in</p> <p>5 some other way, not through --</p> <p>6 MR. KELLER: Not through the</p> <p>7 system.</p> <p>8 So what drove the Second</p> <p>9 Circuit in Cablevision was this</p> <p>10 notion that the RSDVR service was a</p> <p>11 storage service. That led directly</p> <p>12 to the analogy of the VCR in your</p> <p>13 home moved upstream.</p> <p>14 And the Second Circuit</p> <p>15 concluded that because it was not a</p> <p>16 retransmission service, it was not</p> <p>17 a public performance at the point</p> <p>18 at which you played back what you</p> <p>19 previously had.</p> <p>20 JUDGE DRONEY: So in the Aereo</p> <p>21 system, if you hit pause on the</p> <p>22 watch mode for five seconds, is it</p> <p>23 still a public performance after</p> <p>24 that or is that a unique copy after</p> <p>25 you do that?</p>
<p style="text-align: right;">Page 23</p> <p>1 PROCEEDINGS</p> <p>2 I think the bigger point is</p> <p>3 under the Second Circuit precedent,</p> <p>4 Kirkwood matters. Kirkwood says</p> <p>5 that what a consumer might be able</p> <p>6 to do on his or her own with a</p> <p>7 piece of equipment is one thing.</p> <p>8 Cablevision basically says the same</p> <p>9 thing when it uses the VCR analogy</p> <p>10 as the analogy that governs the</p> <p>11 day.</p> <p>12 It's another thing when a</p> <p>13 third party commercial service</p> <p>14 insinuates itself into the process,</p> <p>15 they don't get to stand in the</p> <p>16 shoes of what you could do if you</p> <p>17 could afford the Slingbox.</p> <p>18 JUDGE CHIN: How is the Aereo</p> <p>19 system different from the Slingbox</p> <p>20 system as a factual matter?</p> <p>21 MR. KELLER: I think that the</p> <p>22 difference between the Aereo system</p> <p>23 is that it is a full-fledged</p> <p>24 service. There are a number of</p> <p>25 findings in the District Court's</p>	<p style="text-align: right;">Page 25</p> <p>1 PROCEEDINGS</p> <p>2 MR. KELLER: The unique copies</p> <p>3 don't matter here when the system</p> <p>4 enables the subscribers to watch</p> <p>5 it.</p> <p>6 JUDGE DRONEY: It's a private</p> <p>7 performance then. If you are in a</p> <p>8 watch mode, you pause it for five</p> <p>9 seconds and resume watching, does</p> <p>10 that now become a private</p> <p>11 performance?</p> <p>12 MR. KELLER: No. Because --</p> <p>13 and Congress, this gets to the</p> <p>14 point earlier, Congress</p> <p>15 contemplated technological devices</p> <p>16 evolving over time. They said,</p> <p>17 doesn't matter how you do it. Any</p> <p>18 device or process that facilitates</p> <p>19 the retransmission is going to be</p> <p>20 swept up in the Transmit Clause.</p> <p>21 And then went further. It</p> <p>22 said not only that, you could</p> <p>23 retransmit at different times, same</p> <p>24 time, different places, same</p> <p>25 places, all of it is embraced. The</p>

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<p style="text-align: right;">Page 26</p> <p>1 PROCEEDINGS</p> <p>2 eye is on the retransmission</p> <p>3 service and what it does in terms</p> <p>4 of retransmitting the initial</p> <p>5 copyrighted performance.</p> <p>6 And the difference between the</p> <p>7 Cablevision decision and this case</p> <p>8 is the difference between storage</p> <p>9 and retransmission.</p> <p>10 And how do we know that, we</p> <p>11 know that from what the Second</p> <p>12 Circuit subsequently said in the</p> <p>13 ASCAP case. Because in ASCAP they</p> <p>14 drew the same distinction between a</p> <p>15 musical file download, a stored</p> <p>16 copy of something that was sent on</p> <p>17 but not in any way that could</p> <p>18 possibly be perceived, according to</p> <p>19 the ASCAP panel, as a performance,</p> <p>20 in a stream. Which they said could</p> <p>21 very well be a performance.</p> <p>22 But Cablevision went further,</p> <p>23 and this is really crucial. Not</p> <p>24 only did it distinguish between</p> <p>25 storage and retransmission, it said</p>	<p style="text-align: right;">Page 28</p> <p>1 PROCEEDINGS</p> <p>2 their decision. They said a</p> <p>3 different delivery system design</p> <p>4 may well result in a different</p> <p>5 analysis of whether there is a</p> <p>6 public performance.</p> <p>7 So they started with the VCR</p> <p>8 analogy because it was a storage</p> <p>9 system. They didn't exculpate all</p> <p>10 retransmission services because</p> <p>11 they used unique copies, and they</p> <p>12 warn that different designs may</p> <p>13 matter. And here you have a very</p> <p>14 different design.</p> <p>15 Which takes me through the</p> <p>16 third point about Aereo and the</p> <p>17 record.</p> <p>18 Aereo is at the heart of the</p> <p>19 Transmit Clause because they admit</p> <p>20 that they are a retransmission</p> <p>21 service. Super Bowl comes in,</p> <p>22 Super Bowl goes out, all within</p> <p>23 seconds. They advertise themselves</p> <p>24 as a service that you can use to</p> <p>25 watch television without cable. No</p>
<p style="text-align: right;">Page 27</p> <p>1 PROCEEDINGS</p> <p>2 we are not going to lay down a rule</p> <p>3 that all unique copies always</p> <p>4 render something a private</p> <p>5 performance.</p> <p>6 They did it at least three</p> <p>7 places in the opinion. The first</p> <p>8 was saying that copies may be</p> <p>9 relevant to whether or not</p> <p>10 something's a private performance,</p> <p>11 based on whether they truly play an</p> <p>12 audience-limiting function.</p> <p>13 Then they said, and another</p> <p>14 thing, not only is it just relevant</p> <p>15 and not determinative, they</p> <p>16 qualified that statement in the</p> <p>17 very next paragraph when they said,</p> <p>18 and by the way, we're not analyzing</p> <p>19 the concept of to the public for</p> <p>20 all purposes, we are not analyzing</p> <p>21 the contours of to the public in</p> <p>22 any great detail.</p> <p>23 And then it went on on the</p> <p>24 very next page to say even more</p> <p>25 about how cabined they were making</p>	<p style="text-align: right;">Page 29</p> <p>1 PROCEEDINGS</p> <p>2 cable required. Broadcast TV is</p> <p>3 right on its home page.</p> <p>4 That's at pages 15 -- well,</p> <p>5 page 55 of the record, and</p> <p>6 Mr. Kanojo said it on the stand at</p> <p>7 pages 1570 to 71 of the record.</p> <p>8 And it's in its very</p> <p>9 positioning statement. Aereo is a</p> <p>10 retransmission statement by its own</p> <p>11 design. And because it doesn't</p> <p>12 break the retransmission chain,</p> <p>13 which the Second Circuit found was</p> <p>14 broken in Cablevision because of</p> <p>15 the act of storage, and then the</p> <p>16 subsequent act, private playback,</p> <p>17 on those facts Aereo does not get</p> <p>18 the benefit of the Cablevision</p> <p>19 analysis.</p> <p>20 I reserve some time.</p> <p>21 JUDGE CHIN: Yes.</p> <p>22 MR. KELLER: Thank you very</p> <p>23 much.</p> <p>24 MR. HOSP: Your Honors, David</p> <p>25 Hosp for Aereo.</p>

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<p style="text-align: right;">Page 30</p> <p>1 PROCEEDINGS</p> <p>2 May it please the court, I</p> <p>3 will respond to a number of the</p> <p>4 comments that have been made by</p> <p>5 both attorneys for plaintiffs.</p> <p>6 But first, I'd like to make</p> <p>7 five basic points with respect to</p> <p>8 this case. First, I think you</p> <p>9 heard this from opposing counsel,</p> <p>10 consumers have the right to make</p> <p>11 private performances. They have</p> <p>12 the right to use an antenna, they</p> <p>13 have the right to use a DVR, and</p> <p>14 they have the right to use a</p> <p>15 Slingbox type system, an internet</p> <p>16 connection that allows them to make</p> <p>17 private performances.</p> <p>18 Second, supplying the</p> <p>19 technology to accomplish this does</p> <p>20 not constitute a violation of the</p> <p>21 private performance right. And</p> <p>22 particularly it does not constitute</p> <p>23 a direct infringement of any</p> <p>24 copyright. And that is the only</p> <p>25 thing that has been challenged</p>	<p style="text-align: right;">Page 32</p> <p>1 PROCEEDINGS</p> <p>2 Judge Nathan in her decision was</p> <p>3 very clear that in fact a consumer</p> <p>4 makes the copy. She said, whether</p> <p>5 a user watches a program through</p> <p>6 Aereo's service as it is being</p> <p>7 broadcast or after the initial</p> <p>8 broadcast ends, does not change</p> <p>9 that the transmission is made from</p> <p>10 a unique copy previously created by</p> <p>11 that user, accessible and</p> <p>12 transmitted only to that user.</p> <p>13 JUDGE CHIN: Only the prior</p> <p>14 creation of that copy, the consumer</p> <p>15 got it from Aereo. True?</p> <p>16 MR. HOSP: Yes. The consumer</p> <p>17 accessed it through the antenna</p> <p>18 that Aereo provided.</p> <p>19 JUDGE CHIN: It seems to me in</p> <p>20 Cablevision, there was an ongoing</p> <p>21 relationship between the consumer</p> <p>22 and Cablevision. The consumer was</p> <p>23 receiving the broadcast through</p> <p>24 Cablevision. Cablevision as a</p> <p>25 cable provider had the right to do</p>
<p style="text-align: right;">Page 31</p> <p>1 PROCEEDINGS</p> <p>2 here, is a direct infringement --</p> <p>3 JUDGE CHIN: Do you concede</p> <p>4 that Aereo is transmitting?</p> <p>5 MR. HOSP: Consumers in the</p> <p>6 Aereo system transmit a copy of --</p> <p>7 JUDGE CHIN: My question is,</p> <p>8 do you concede that Aereo is</p> <p>9 retransmitting -- that Aereo</p> <p>10 captures broadcasts and then</p> <p>11 retransmits them?</p> <p>12 MR. HOSP: No, your Honor.</p> <p>13 Aereo transmits a copy that</p> <p>14 has been made by the consumer.</p> <p>15 That's what's done using the Aereo</p> <p>16 system. And that is, it's a</p> <p>17 significant difference.</p> <p>18 I take your Honor back to the</p> <p>19 ASCAP decision --</p> <p>20 JUDGE CHIN: How does the</p> <p>21 consumer -- are you suggesting the</p> <p>22 consumer is making the copy on her</p> <p>23 own, or is it doing with it with</p> <p>24 the assistance of Aereo?</p> <p>25 MR. HOSP: Well, your Honor,</p>	<p style="text-align: right;">Page 33</p> <p>1 PROCEEDINGS</p> <p>2 that. And then the consumer is</p> <p>3 making a copy. Instead of doing it</p> <p>4 in his living room, he's doing it</p> <p>5 through machinery at Cablevision.</p> <p>6 Here there is no ongoing</p> <p>7 relationship or prior relationship</p> <p>8 with Aereo. And it's that first</p> <p>9 capturing of the broadcasting that</p> <p>10 results in the consumer having it.</p> <p>11 So why doesn't that make this</p> <p>12 case different from Cablevision?</p> <p>13 MR. HOSP: It doesn't because</p> <p>14 the Cablevision court specifically</p> <p>15 addressed that issue. In fact, it</p> <p>16 was an issue that was raised by the</p> <p>17 plaintiffs in that case.</p> <p>18 What the plaintiffs said was,</p> <p>19 in fact they argued to this court,</p> <p>20 the transmission, where Cablevision</p> <p>21 split the stream and directed that</p> <p>22 stream into the RSDVR system, the</p> <p>23 plaintiffs themselves said that's</p> <p>24 unlicensed, that's completely out</p> <p>25 of bounds, nothing that they do</p>

<p style="text-align: right;">Page 34</p> <p>1 PROCEEDINGS</p> <p>2 within the RSDVR system is licensed</p> <p>3 at all.</p> <p>4 And this court accepted that.</p> <p>5 It accepted them at their word, and</p> <p>6 they said --</p> <p>7 JUDGE CHIN: But the</p> <p>8 plaintiffs were unsuccessful on</p> <p>9 that point.</p> <p>10 But before it got to the point</p> <p>11 where they were separating the</p> <p>12 stream, there was a license for</p> <p>13 that. And doesn't that make this</p> <p>14 case different?</p> <p>15 MR. HOSP: Your Honor, it</p> <p>16 doesn't make this case different</p> <p>17 because the transmission that this</p> <p>18 court considered in Cablevision was</p> <p>19 the transmission from the</p> <p>20 individual copy to the individual.</p> <p>21 And basically what Cablevision said</p> <p>22 was, the court accepted the</p> <p>23 plaintiffs' argument that in fact</p> <p>24 the transmission, the splitting of</p> <p>25 the stream that went into the RSDVR</p>	<p style="text-align: right;">Page 36</p> <p>1 PROCEEDINGS</p> <p>2 their watch function. And none of</p> <p>3 them has paused it.</p> <p>4 Aren't those 5,000 people</p> <p>5 seeing the exact same thing at the</p> <p>6 exact same time?</p> <p>7 MR. HOSP: They are not,</p> <p>8 actually. And this was a finding</p> <p>9 that the court made.</p> <p>10 In fact, what happens in the</p> <p>11 Aereo system is a consumer logs on,</p> <p>12 they are assigned an antenna. And</p> <p>13 that individual antenna receives</p> <p>14 its own individual signal.</p> <p>15 And what was shown at the</p> <p>16 hearing was in fact the signals</p> <p>17 that are generated in each</p> <p>18 individual's antenna are different.</p> <p>19 There was actual, an actual factual</p> <p>20 determination, there was evidence</p> <p>21 that showed that in fact antenna A</p> <p>22 is generating a slightly different</p> <p>23 signal from antenna B.</p> <p>24 JUDGE DRONEY: How is it</p> <p>25 different?</p>
<p style="text-align: right;">Page 35</p> <p>1 PROCEEDINGS</p> <p>2 system, was not licensed.</p> <p>3 And what Cablevision said was,</p> <p>4 you know what, that doesn't matter.</p> <p>5 It doesn't matter whether or not</p> <p>6 that stream is licensed or not,</p> <p>7 because ultimately the only thing</p> <p>8 that we're looking at is the nature</p> <p>9 of the transmission itself.</p> <p>10 And the transmission at issue,</p> <p>11 and this is the fundamental holding</p> <p>12 of Cablevision, but not just</p> <p>13 Cablevision, it's the fundamental</p> <p>14 holding, it's one of the</p> <p>15 fundamental holdings of ASCAP too.</p> <p>16 It is that a transmission from an</p> <p>17 individual copy to a single</p> <p>18 individual is not a public</p> <p>19 performance.</p> <p>20 JUDGE DRONEY: Let's talk</p> <p>21 about the individualization of</p> <p>22 this. Let's hypothetically say</p> <p>23 Monday Night Football,</p> <p>24 Giants/Redskins, next Monday, 5,000</p> <p>25 Aereo customers are watching it on</p>	<p style="text-align: right;">Page 37</p> <p>1 PROCEEDINGS</p> <p>2 JUDGE GLEESON: Redskins might</p> <p>3 win in some homes but lose in</p> <p>4 others?</p> <p>5 MR. HOSP: They might. It</p> <p>6 might be broadcast differently down</p> <p>7 in Washington.</p> <p>8 No, what was the difference</p> <p>9 is, again, they're not differences</p> <p>10 that make a significant impact on</p> <p>11 the perception and what you are</p> <p>12 actually sort of seeing.</p> <p>13 JUDGE DRONEY: People have</p> <p>14 different quality TVs too. How is</p> <p>15 what they're watching different?</p> <p>16 If they're just on their watch</p> <p>17 function, they haven't paused it,</p> <p>18 aren't they seeing the same 3rd</p> <p>19 down and 3 play at the same time as</p> <p>20 the 4,000 other customers?</p> <p>21 MR. HOSP: Again, they may be</p> <p>22 viewing it at the same time.</p> <p>23 But under Cablevision and</p> <p>24 under ASCAP what they are viewing,</p> <p>25 what is being transmitted to them</p>

<p style="text-align: right;">Page 38</p> <p>1 PROCEEDINGS</p> <p>2 is different from what is being</p> <p>3 transmitted to others.</p> <p>4 JUDGE CHIN: You're saying</p> <p>5 that's an individualized copy?</p> <p>6 MR. HOSP: Yes, exactly.</p> <p>7 It is both an individual --</p> <p>8 JUDGE CHIN: Does that make</p> <p>9 any sense? Millions of people are</p> <p>10 watching the football game, they</p> <p>11 get it through Aereo, and put aside</p> <p>12 the record function, and that's not</p> <p>13 getting a retransmission from</p> <p>14 Aereo? That's the position?</p> <p>15 MR. HOSP: Under the Transmit</p> <p>16 Clause, and under particularly --</p> <p>17 JUDGE CHIN: But as a matter</p> <p>18 of common sense. Is it at all</p> <p>19 logical that, you know, the 25,000</p> <p>20 people who are watching it</p> <p>21 individually on their, through</p> <p>22 their Aereo system, that they are</p> <p>23 watching an individualized copy and</p> <p>24 they're not watching the football</p> <p>25 game?</p>	<p style="text-align: right;">Page 40</p> <p>1 PROCEEDINGS</p> <p>2 would be consistent with the</p> <p>3 Copyright Act because it's still a</p> <p>4 copy. Is that the position?</p> <p>5 MR. HOSP: Your Honor, just to</p> <p>6 clarify your hypothetical.</p> <p>7 Are you saying that there is</p> <p>8 still a fixed copy that is</p> <p>9 cognizable?</p> <p>10 JUDGE CHIN: Exact same</p> <p>11 technology, except that the</p> <p>12 consumer, the Aereo subscriber does</p> <p>13 not have the option of hitting a</p> <p>14 record button. All he can do is</p> <p>15 watch.</p> <p>16 MR. HOSP: That would be a</p> <p>17 very, very different situation.</p> <p>18 Because there -- and again, the</p> <p>19 real question, under Cablevision</p> <p>20 and ASCAP is whether or not a fixed</p> <p>21 copy is made. Which is different</p> <p>22 from a streaming situation.</p> <p>23 JUDGE CHIN: The exact same</p> <p>24 technology except you're not giving</p> <p>25 the option of letting the person</p>
<p style="text-align: right;">Page 39</p> <p>1 PROCEEDINGS</p> <p>2 MR. HOSP: It is logical based</p> <p>3 on the system that Congress put in</p> <p>4 place.</p> <p>5 This all goes back to the</p> <p>6 Transmit Clause, and what the</p> <p>7 Transmit Clause says is, that the</p> <p>8 performance at issue --</p> <p>9 JUDGE CHIN: What if you took</p> <p>10 away the record function</p> <p>11 completely, and this were just a</p> <p>12 system for streaming and watching.</p> <p>13 Like I view. Is that -- and that's</p> <p>14 perfectly fine?</p> <p>15 MR. HOSP: No, no. If you're</p> <p>16 talking about a streaming service</p> <p>17 where there is no fixed copy that's</p> <p>18 being made, then no, that is a</p> <p>19 public performance issue.</p> <p>20 You could see this distinction</p> <p>21 with respect to --</p> <p>22 JUDGE CHIN: But if you take</p> <p>23 away the record function, instead</p> <p>24 of two buttons your only choice is</p> <p>25 to watch, you're saying it still</p>	<p style="text-align: right;">Page 41</p> <p>1 PROCEEDINGS</p> <p>2 record it. Otherwise the</p> <p>3 technology is the same, in terms of</p> <p>4 the copying, et cetera, that's all</p> <p>5 the say.</p> <p>6 Would that violate the</p> <p>7 Copyright Act?</p> <p>8 MR. HOSP: If there was --</p> <p>9 again, if there is a fixed copy</p> <p>10 being made, then no, it would not.</p> <p>11 Under Cablevision, under my</p> <p>12 reading of Cablevision, again, you</p> <p>13 don't need to reach that question</p> <p>14 because that's not the question</p> <p>15 that's presented in this case.</p> <p>16 But under my reading of</p> <p>17 Cablevision, what Cablevision says</p> <p>18 is where you have a unique fixed</p> <p>19 copy, you now have a reproduction</p> <p>20 issue. But it's no longer a public</p> <p>21 performance issue.</p> <p>22 And again, coming back to</p> <p>23 ASCAP, think about it, you're</p> <p>24 sitting at your computer and you</p> <p>25 want to listen to a song, you want</p>

<p style="text-align: right;">Page 42</p> <p>1 PROCEEDINGS</p> <p>2 to listen to a song right now.</p> <p>3 You've got two ways to do it. You</p> <p>4 can stream it, and if you stream it</p> <p>5 what's happening is you are</p> <p>6 actually streaming it from a common</p> <p>7 copy that other people have access</p> <p>8 to. And that's a public</p> <p>9 performance issue. It's not a</p> <p>10 reproduction issue, because there</p> <p>11 is no fixed copy that's being made.</p> <p>12 The other way you can listen</p> <p>13 to music right now is to download</p> <p>14 it. And what you do is you</p> <p>15 download it, it takes a couple of</p> <p>16 seconds, there is a couple of</p> <p>17 seconds delay, and then when you</p> <p>18 play that, again, within a couple</p> <p>19 of seconds, what you are playing is</p> <p>20 an individual copy.</p> <p>21 And that's the circumstance</p> <p>22 that ASCAP, this court examined in</p> <p>23 ASCAP. What this court said was,</p> <p>24 you know what, that's not a public</p> <p>25 performance. It doesn't matter,</p>	<p style="text-align: right;">Page 44</p> <p>1 PROCEEDINGS</p> <p>2 stands in the Second Circuit, that</p> <p>3 is, if that individual copy is</p> <p>4 going directly to only one</p> <p>5 individual and is only accessed by</p> <p>6 that individual, what you have is a</p> <p>7 copy issue.</p> <p>8 JUDGE GLEESON: But if it was</p> <p>9 just one retransmission, you</p> <p>10 wouldn't win; right?</p> <p>11 MR. HOSP: If it was --</p> <p>12 JUDGE GLEESON: If you had no</p> <p>13 individual antennas, no</p> <p>14 individualized copies, you'd lose?</p> <p>15 MR. HOSP: Yes. If it was one</p> <p>16 antenna and no copies being made,</p> <p>17 at that point you --</p> <p>18 JUDGE GLEESON: Does the</p> <p>19 provider of Video-on-Demand content</p> <p>20 create a public performance when it</p> <p>21 provides a movie to someone in</p> <p>22 Video-on-Demand?</p> <p>23 MR. HOSP: Yes, absolutely.</p> <p>24 And that's exactly the same</p> <p>25 situation that the court, the</p>
<p style="text-align: right;">Page 43</p> <p>1 PROCEEDINGS</p> <p>2 because now you've got a copy</p> <p>3 issue. You've got a reproduction</p> <p>4 right issue. These are two rights</p> <p>5 that work in tandem with each</p> <p>6 other.</p> <p>7 JUDGE DRONEY: Let me ask you</p> <p>8 about the antennas.</p> <p>9 Would you still be arguing</p> <p>10 that these are not public</p> <p>11 performances if instead of all</p> <p>12 these antennas you just had one?</p> <p>13 Is the system, without that</p> <p>14 feature, still not a public</p> <p>15 performance?</p> <p>16 MR. HOSP: Well, again, it's a</p> <p>17 very different case than what we</p> <p>18 have here. And we do believe that</p> <p>19 the antennas matter in this case.</p> <p>20 But under the holding in</p> <p>21 Cablevision, where you're talking</p> <p>22 about a system like this, where</p> <p>23 there is an individual copy that is</p> <p>24 being made, under the ruling in</p> <p>25 Cablevision, under the law as it</p>	<p style="text-align: right;">Page 45</p> <p>1 PROCEEDINGS</p> <p>2 Cablevision court addressed when it</p> <p>3 talked about the on-command in the</p> <p>4 Redhorn cases.</p> <p>5 JUDGE GLEESON: Would it be</p> <p>6 different if a provider of</p> <p>7 Video-on-Demand created an</p> <p>8 individualized hard drive for each</p> <p>9 of the subscribers, would they then</p> <p>10 be creating a private performance</p> <p>11 and not have to worry about paying</p> <p>12 royalties?</p> <p>13 MR. HOSP: That's exactly what</p> <p>14 ASCAP is. And what ASCAP held was</p> <p>15 in that situation where what you</p> <p>16 have is somebody making an</p> <p>17 individual copy, what you have is a</p> <p>18 reproduction right issue. But it's</p> <p>19 not a public performance right</p> <p>20 issue.</p> <p>21 That is exactly the issue that</p> <p>22 was decided by this court in ASCAP</p> <p>23 when it said, you know what, these</p> <p>24 are two rights that function in a</p> <p>25 complementary way. And Cablevision</p>

<p style="text-align: right;">Page 46</p> <p>1 PROCEEDINGS</p> <p>2 recognized that. Cablevision</p> <p>3 recognized the notion that it was</p> <p>4 okay that by creating a copy you no</p> <p>5 longer had a public performance</p> <p>6 issue, because you now were</p> <p>7 creating -- you essentially were</p> <p>8 picking your poison. You were</p> <p>9 creating a reproduction right</p> <p>10 issue.</p> <p>11 And what Cablevision says is,</p> <p>12 that's okay because you have</p> <p>13 another right to go under.</p> <p>14 Now, in this particular case,</p> <p>15 because of the Supreme Court's</p> <p>16 decision in Sony, we believe that</p> <p>17 the consumer making the copy is a</p> <p>18 fair use. And therefore while it</p> <p>19 does implicate the reproduction</p> <p>20 right, we believe that it is not a</p> <p>21 violation of that reproduction</p> <p>22 right, because it's foreclosed</p> <p>23 under Sony.</p> <p>24 But that's an issue that's</p> <p>25 being litigated in the District</p>	<p style="text-align: right;">Page 48</p> <p>1 PROCEEDINGS</p> <p>2 number of different reasons.</p> <p>3 JUDGE DRONEY: Is there any</p> <p>4 technological reason for it?</p> <p>5 MR. HOSP: There is.</p> <p>6 Is there a technological</p> <p>7 reason in terms of?</p> <p>8 JUDGE DRONEY: Does it make</p> <p>9 the transmissions better? Why do</p> <p>10 it, why do you spend all the money</p> <p>11 on all these little antennas when</p> <p>12 you can do it with one big antenna?</p> <p>13 MR. HOSP: It makes it clear</p> <p>14 that there are in fact two bases</p> <p>15 for this being legal under the</p> <p>16 Copyright Act. I mean, that's what</p> <p>17 Judge Nathan made clear, was that</p> <p>18 the copies themselves, under the</p> <p>19 law as it is --</p> <p>20 JUDGE CHIN: But it seems</p> <p>21 you're exalting form over</p> <p>22 substance. You're going through</p> <p>23 this fiction of using, you know, a</p> <p>24 million itty-bitty antennas when</p> <p>25 really you'd rather do it with one,</p>
<p style="text-align: right;">Page 47</p> <p>1 PROCEEDINGS</p> <p>2 Court.</p> <p>3 JUDGE DRONEY: Can I get back</p> <p>4 to my antenna question.</p> <p>5 It sounded like you said even</p> <p>6 with one antenna you'd still be</p> <p>7 arguing the same position under</p> <p>8 Cablevision that the individualized</p> <p>9 copies here do not constitute a</p> <p>10 public performance. That's what</p> <p>11 you said, right?</p> <p>12 MR. HOSP: Your Honor, if we</p> <p>13 were presented with that, it's my</p> <p>14 reading of Cablevision that because</p> <p>15 there is an individual copy, that</p> <p>16 it would foreclose a public</p> <p>17 performance finding there.</p> <p>18 JUDGE DRONEY: Even with just</p> <p>19 one antenna?</p> <p>20 MR. HOSP: Even with just one</p> <p>21 antenna. But again, that is not</p> <p>22 our situation.</p> <p>23 JUDGE DRONEY: So why did you</p> <p>24 build all these antennas?</p> <p>25 MR. HOSP: Well, there are a</p>	<p style="text-align: right;">Page 49</p> <p>1 PROCEEDINGS</p> <p>2 just to try to fit within</p> <p>3 Cablevision.</p> <p>4 Isn't that what's happening?</p> <p>5 MR. HOSP: No, your Honor.</p> <p>6 JUDGE CHIN: No? Is there any</p> <p>7 legitimate business reason for</p> <p>8 having all of these little</p> <p>9 itty-bitty antennas?</p> <p>10 MR. HOSP: I guess I'm not --</p> <p>11 JUDGE CHIN: Any technological</p> <p>12 reason.</p> <p>13 MR. HOSP: Is there any</p> <p>14 logical reason?</p> <p>15 JUDGE CHIN: Technological</p> <p>16 reason.</p> <p>17 MR. HOSP: Technological</p> <p>18 reason.</p> <p>19 The reason for having the</p> <p>20 antennas is to comply with the</p> <p>21 Copyright Act. And we believe that</p> <p>22 in both instances it complies with</p> <p>23 the Copyright Act.</p> <p>24 And again, this is something,</p> <p>25 the argument that plaintiffs have</p>

13 (Pages 46 to 49)

<p style="text-align: right;">Page 50</p> <p>1 PROCEEDINGS</p> <p>2 made that the court, the District</p> <p>3 Court paid too much attention to</p> <p>4 the form of --</p> <p>5 JUDGE CHIN: Let's extend this</p> <p>6 to books. You send an electronic</p> <p>7 book to a consumer, you make it a</p> <p>8 little bit different, you put the</p> <p>9 purchaser's name on it. Does that</p> <p>10 now suddenly become a private</p> <p>11 performance?</p> <p>12 MR. HOSP: Well, again --</p> <p>13 JUDGE CHIN: Under the logic</p> <p>14 that you're advocating in this</p> <p>15 case?</p> <p>16 MR. HOSP: Again, with respect</p> <p>17 to books, the public performance</p> <p>18 right obviously doesn't apply.</p> <p>19 But taking your argument for</p> <p>20 what I think that you're asking,</p> <p>21 the answer is yes, this, for</p> <p>22 example, all comes back to ASCAP.</p> <p>23 If you basically take it in the</p> <p>24 music industry situation, yes, what</p> <p>25 this court held was that where you</p>	<p style="text-align: right;">Page 52</p> <p>1 PROCEEDINGS</p> <p>2 if you turn it around and you say</p> <p>3 okay, let's accept, for example,</p> <p>4 these aggregation arguments. What</p> <p>5 you're saying is every time</p> <p>6 somebody goes up on a roof and puts</p> <p>7 an antenna on a roof and then</p> <p>8 transmits that signal down to their</p> <p>9 own television, that's now a public</p> <p>10 performance because that has to be</p> <p>11 aggregated with the original</p> <p>12 broadcaster's performance.</p> <p>13 Every single question that is</p> <p>14 raised by the plaintiffs was</p> <p>15 actually specifically addressed in</p> <p>16 the Cablevision decision.</p> <p>17 JUDGE CHIN: But that's not</p> <p>18 what's happening here. Aereo is</p> <p>19 providing the service so the</p> <p>20 consumer doesn't have to go up on</p> <p>21 the roof. And the consumer can</p> <p>22 stay downstairs.</p> <p>23 Why isn't that retransmission?</p> <p>24 MR. HOSP: Because the</p> <p>25 analysis is the same under the</p>
<p style="text-align: right;">Page 51</p> <p>1 PROCEEDINGS</p> <p>2 make a copy, even if you're</p> <p>3 listening to it right away, where</p> <p>4 you make a copy, it's not a public</p> <p>5 performance anymore. And that's</p> <p>6 important because you do have</p> <p>7 another right to go under.</p> <p>8 And in fact, when you read the</p> <p>9 Cablevision decision, at the end of</p> <p>10 the Cablevision decision, the end</p> <p>11 of the Cablevision decision makes</p> <p>12 clear that this court understood</p> <p>13 exactly what it was doing. This</p> <p>14 court said, you know what, we're</p> <p>15 not saying that there is no</p> <p>16 copyright protection here, we're</p> <p>17 not saying that there aren't</p> <p>18 possibilities in many instances</p> <p>19 where you're not going to have a</p> <p>20 right either under indirect</p> <p>21 infringement or potentially under</p> <p>22 your reproduction right. And</p> <p>23 that's okay.</p> <p>24 And it's important to do that</p> <p>25 because if you take the flip side,</p>	<p style="text-align: right;">Page 53</p> <p>1 PROCEEDINGS</p> <p>2 Copyright Act in either instance.</p> <p>3 What the Copyright Act held is --</p> <p>4 what the Copyright Act says, what</p> <p>5 Congress intended, was for the</p> <p>6 analysis to be the transmission of</p> <p>7 the performance, rather than the</p> <p>8 transmission of the work.</p> <p>9 And again, this is really what</p> <p>10 plaintiffs are asking you to do, is</p> <p>11 overturn Cablevision. That's</p> <p>12 what's at issue. And what's being</p> <p>13 said here is that Cablevision is</p> <p>14 wrong. We disagree with</p> <p>15 Cablevision.</p> <p>16 JUDGE CHIN: I think the</p> <p>17 District Judge got it right in</p> <p>18 Cablevision. But of course we're</p> <p>19 bound by the Circuit decision.</p> <p>20 MR. HOSP: And that really is</p> <p>21 what's, you know, in this instance</p> <p>22 it's the sort of thing where --</p> <p>23 JUDGE GLEESON: And to put</p> <p>24 your position as just as bluntly,</p> <p>25 you seem to be reticent to say it</p>

<p style="text-align: right;">Page 54</p> <p>1 PROCEEDINGS</p> <p>2 out loud, the model is built around</p> <p>3 Cablevision?</p> <p>4 MR. HOSP: Yes.</p> <p>5 JUDGE GLEESON: You don't have</p> <p>6 all these little antennas because</p> <p>7 it makes any sense, it's kind of</p> <p>8 like constructing your business</p> <p>9 affairs to avoid taxes. Right?</p> <p>10 It's tax avoidance is different</p> <p>11 from tax evasion.</p> <p>12 But you built this business</p> <p>13 and the technology with Cablevision</p> <p>14 in mind to avoid copyright</p> <p>15 violations; correct?</p> <p>16 MR. HOSP: Everyone in this</p> <p>17 case agrees that Aereo designed</p> <p>18 this system to comply with</p> <p>19 copyright and to follow the law as</p> <p>20 this court laid down in</p> <p>21 Cablevision.</p> <p>22 Now, the plaintiffs --</p> <p>23 JUDGE GLEESON: And the reason</p> <p>24 you have all the little tiny</p> <p>25 antennas is simple, it's because,</p>	<p style="text-align: right;">Page 56</p> <p>1 PROCEEDINGS</p> <p>2 JUDGE CHIN: Is it your view</p> <p>3 that this case is exactly like</p> <p>4 Cablevision?</p> <p>5 MR. HOSP: Well, the District</p> <p>6 Court --</p> <p>7 JUDGE CHIN: Even though there</p> <p>8 isn't that ongoing relationship</p> <p>9 between the subscriber and Aereo as</p> <p>10 there was in Cablevision?</p> <p>11 MR. HOSP: Well, your Honor, I</p> <p>12 believe there is an ongoing</p> <p>13 relationship.</p> <p>14 But the District Court made</p> <p>15 factual determinations that in fact</p> <p>16 all of the facts that are relevant</p> <p>17 to the Cablevision finding are</p> <p>18 present here. The District Court</p> <p>19 made those factual findings</p> <p>20 specifically. And those factual</p> <p>21 findings have not been challenged.</p> <p>22 JUDGE CHIN: You don't think</p> <p>23 you're asking us to go one step</p> <p>24 further than Cablevision with this</p> <p>25 case?</p>
<p style="text-align: right;">Page 55</p> <p>1 PROCEEDINGS</p> <p>2 in your view, kind of a belt and</p> <p>3 suspenders approach to avoiding the</p> <p>4 public performance?</p> <p>5 MR. HOSP: And it follows the</p> <p>6 law and it follows the Copyright</p> <p>7 Act.</p> <p>8 Now, plaintiffs suggested</p> <p>9 somehow this is a bad thing that</p> <p>10 Cablevision -- that Aereo has</p> <p>11 decided to follow the law. It's an</p> <p>12 argument that doesn't make sense.</p> <p>13 The law, this court decided</p> <p>14 what the law was. And Aereo</p> <p>15 followed it to a T. And the law is</p> <p>16 what it is.</p> <p>17 This court -- let me make</p> <p>18 clear, I believe that the Second</p> <p>19 Circuit got it right in</p> <p>20 Cablevision. Because it's the</p> <p>21 balance between private performance</p> <p>22 and public performance that</p> <p>23 Congress indicated it wanted to</p> <p>24 strike.</p> <p>25 And so this is a situation --</p>	<p style="text-align: right;">Page 57</p> <p>1 PROCEEDINGS</p> <p>2 MR. HOSP: No, no. This</p> <p>3 doesn't extend Cablevision at all.</p> <p>4 Not even a little bit. This case</p> <p>5 is on all fours with Cablevision.</p> <p>6 The question under Cablevision</p> <p>7 and under ASCAP, it's not just</p> <p>8 Cablevision, it's ASCAP as well,</p> <p>9 and other courts have followed this</p> <p>10 as well, it's whether or not there</p> <p>11 is a single unique copy and who can</p> <p>12 receive that copy. And that's what</p> <p>13 the law says. And in fact that's</p> <p>14 how the law stands.</p> <p>15 This is why the court -- and</p> <p>16 this is why the Supreme Court noted</p> <p>17 that in instances like this where</p> <p>18 you're dealing with new technology,</p> <p>19 courts have to be very circumspect</p> <p>20 about extending copyright.</p> <p>21 We're not asking to extend</p> <p>22 Cablevision. Plaintiffs are asking</p> <p>23 to extend the Copyright Act.</p> <p>24 Appellants here are asking you</p> <p>25 fundamentally to change the law and</p>

15 (Pages 54 to 57)

<p style="text-align: right;">Page 58</p> <p>1 PROCEEDINGS</p> <p>2 to overturn Cablevision. To</p> <p>3 overturn ASCAP. And in the process</p> <p>4 to punish Aereo for following the</p> <p>5 law.</p> <p>6 We're asking you not to do</p> <p>7 this. We're asking you to uphold</p> <p>8 Judge Nathan's exceptionally well</p> <p>9 written opinion.</p> <p>10 Thank you, your Honor.</p> <p>11 JUDGE CHIN: Thank you.</p> <p>12 We'll hear rebuttal.</p> <p>13 MR. SMITH: Your Honors, I</p> <p>14 think it's telling that you saw</p> <p>15 from Mr. Hosp's argument no effort</p> <p>16 to explain why their service and</p> <p>17 his particular features with the</p> <p>18 little antennas and the individual</p> <p>19 copies should be exempt under the</p> <p>20 statute as written by Congress.</p> <p>21 Congress made the statute as</p> <p>22 broad as possible. It said the</p> <p>23 function of retransmission by any</p> <p>24 device or process, whether it goes</p> <p>25 to different people, different</p>	<p style="text-align: right;">Page 60</p> <p>1 PROCEEDINGS</p> <p>2 your Honor.</p> <p>3 Another argument that was made</p> <p>4 by the cable companies before the</p> <p>5 '76 Act is we're not harming you,</p> <p>6 we're simply getting your broadcast</p> <p>7 to more people. And more people</p> <p>8 seeing the commercials. Congress</p> <p>9 disagreed with that determination</p> <p>10 and said, if you're making money</p> <p>11 off their broadcast programming</p> <p>12 that they paid to create, you owe</p> <p>13 them license fees.</p> <p>14 What Aereo is saying is we</p> <p>15 found a way to design around it</p> <p>16 using stuff in a decision that is</p> <p>17 about a different factual</p> <p>18 situation.</p> <p>19 The one point I want to make</p> <p>20 is that the same thing is true with</p> <p>21 respect to the record function.</p> <p>22 The statute is clear that a</p> <p>23 retransmission service that delays</p> <p>24 is also covered and also requires a</p> <p>25 license. So if Ivy, for example,</p>
<p style="text-align: right;">Page 59</p> <p>1 PROCEEDINGS</p> <p>2 places, same time, same place, all</p> <p>3 of that ought to be requiring a</p> <p>4 license.</p> <p>5 Instead what they did is they</p> <p>6 designed a system by taking some</p> <p>7 straight language out of the</p> <p>8 Cablevision decision and said we</p> <p>9 think we can exploit this.</p> <p>10 But it makes no sense to think</p> <p>11 that a decision about that one</p> <p>12 little DVR function changed the</p> <p>13 statute and that it binds</p> <p>14 subsequent panels to say well, you</p> <p>15 can do it this way when in fact, as</p> <p>16 was brought out in the questioning,</p> <p>17 they could have 5 million people</p> <p>18 watching the same Monday Night</p> <p>19 Football game live over their</p> <p>20 internet devices without paying a</p> <p>21 dime in license fees for it.</p> <p>22 JUDGE GLEESON: Does this</p> <p>23 enlarge the audience for the</p> <p>24 content?</p> <p>25 MR. SMITH: It might well,</p>	<p style="text-align: right;">Page 61</p> <p>1 PROCEEDINGS</p> <p>2 decided to make a copy of Monday</p> <p>3 Night Football and tell the</p> <p>4 subscribers you can watch this copy</p> <p>5 On Demand whenever you want to for</p> <p>6 the next 36 hours, that would also</p> <p>7 be covered by the Transmit Clause.</p> <p>8 It says same time or different</p> <p>9 times.</p> <p>10 JUDGE DRONEY: As long as</p> <p>11 they're watching the same copy</p> <p>12 though, right?</p> <p>13 MR. SMITH: That is a function</p> <p>14 that clearly the Transmit Clause</p> <p>15 covers in that situation.</p> <p>16 Now, the only question then is</p> <p>17 are you going to let Aereo, which</p> <p>18 has provided this television to</p> <p>19 them through the antennas and made</p> <p>20 it available, suddenly say well,</p> <p>21 we're just a VCR, we're just a DVR,</p> <p>22 because we make individual copies</p> <p>23 instead of doing what Ivy would be</p> <p>24 doing, which is time delayed</p> <p>25 retransmissions.</p>

16 (Pages 58 to 61)

<p style="text-align: right;">Page 62</p> <p>1 PROCEEDINGS</p> <p>2 I think the important point is</p> <p>3 different times is the same as</p> <p>4 saying delayed times. Delayed</p> <p>5 retransmission is the same as the</p> <p>6 live retransmission.</p> <p>7 Thank you, your Honor.</p> <p>8 JUDGE CHIN: Thank you.</p> <p>9 JUDGE GLEESON: Thank you.</p> <p>10 MR. KELLER: We are not asking</p> <p>11 you to overturn the Second</p> <p>12 Circuit's decision in Cablevision</p> <p>13 notwithstanding the rulings of the</p> <p>14 lower court in that case.</p> <p>15 It is not the case that</p> <p>16 Aereo --</p> <p>17 JUDGE GLEESON: District</p> <p>18 judges like overturning the Second</p> <p>19 Circuit.</p> <p>20 MR. KELLER: Mr. Hosp did not</p> <p>21 answer the question directly, Judge</p> <p>22 Chin, when you asked him to concede</p> <p>23 whether Aereo is retransmitting.</p> <p>24 But Aereo conceded it already, at</p> <p>25 page 28 of their brief. There they</p>	<p style="text-align: right;">Page 64</p> <p>1 PROCEEDINGS</p> <p>2 Patriots every time 21-17. It is</p> <p>3 exactly the same performance.</p> <p>4 And the notion that somehow</p> <p>5 it's encoded differently, the name</p> <p>6 on the book example, somehow that</p> <p>7 makes it private, that is not</p> <p>8 common sensical at all. It is a</p> <p>9 retransmission service, pure and</p> <p>10 simple.</p> <p>11 Now, Mr. Hosp suggested that</p> <p>12 without a fixed copy, somehow the</p> <p>13 result is different. No, it's not.</p> <p>14 Either way, Congress said you use</p> <p>15 any device or process, if the end</p> <p>16 result is that the viewer gets the</p> <p>17 performance, it's a retransmission</p> <p>18 of a public performance, that</p> <p>19 violates the Copyright Act without</p> <p>20 a license.</p> <p>21 Now, why is that important?</p> <p>22 Because it's all about the</p> <p>23 difference that clearly separates</p> <p>24 us today on ASCAP. ASCAP came out</p> <p>25 the way it did because at page 74</p>
<p style="text-align: right;">Page 63</p> <p>1 PROCEEDINGS</p> <p>2 say that Aereo is transmitting our</p> <p>3 copyrighted performances, they're</p> <p>4 just not doing it directly. It's</p> <p>5 right at the top of page 28.</p> <p>6 So what? A retransmission</p> <p>7 service, by definition, indirectly</p> <p>8 retransmits the copyrighted works</p> <p>9 of the original broadcaster. That</p> <p>10 is what a cable television system</p> <p>11 does. It receives a signal, runs</p> <p>12 it through the cable head end,</p> <p>13 sends it to its subscribers.</p> <p>14 Aereo is a retransmission</p> <p>15 service in every sense of the word.</p> <p>16 Judge Nathan made specific findings</p> <p>17 on that point. She repeatedly</p> <p>18 talked about Aereo's system</p> <p>19 transmitting our copyrighted</p> <p>20 broadcast to Aereo's subscribers.</p> <p>21 And, Judge Droney, your point</p> <p>22 really was the one I wanted to make</p> <p>23 and never got to. I guarantee you</p> <p>24 that when you watch Super Bowl XLVI</p> <p>25 through Aereo, the Giants beat the</p>	<p style="text-align: right;">Page 65</p> <p>1 PROCEEDINGS</p> <p>2 of that opinion, Judge Walker wrote</p> <p>3 that a performance, if it's not a</p> <p>4 performance, it can't be a public</p> <p>5 performance. That's the holding of</p> <p>6 ASCAP.</p> <p>7 And in that context, the</p> <p>8 download of a previously stored</p> <p>9 musical file to somebody's cell</p> <p>10 phone was viewed, just like we</p> <p>11 argue Cablevision's RSDVR service</p> <p>12 should be viewed, was viewed by the</p> <p>13 panel, as a stored service. It was</p> <p>14 not perceptible at the time that</p> <p>15 the original transmission was</p> <p>16 coming in. There was input, but no</p> <p>17 output.</p> <p>18 And Aereo is not that. It is</p> <p>19 a pure input/output service.</p> <p>20 Without a license, it violates the</p> <p>21 public performance right that the</p> <p>22 broadcasters have because it sells</p> <p>23 our broadcast, our performances, to</p> <p>24 its own subscribers.</p> <p>25 Thank you very much.</p>

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1 PROCEEDINGS
2 JUDGE CHIN: Thank you.
3 We'll reserve decision.
4 (Time noted: 10:49 a.m.)
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1 PROCEEDINGS
2 C E R T I F I C A T E
3 STATE OF NEW YORK)
4 : ss.
5 COUNTY OF NEW YORK)
6 I, ERIC J. FINZ, a Shorthand
7 Reporter and Notary Public within and
8 for the State of New York, do hereby
9 certify that the foregoing proceedings
10 were taken before me on November 30,
11 2012;
12 That the within transcript is
13 a true record of said proceedings;
14 That I am not connected by
15 blood or marriage with any of the
16 parties herein nor interested directly
17 or indirectly in the matter in
18 controversy, nor am I in the employ of
19 the counsel.
20 IN WITNESS WHEREOF, I have
21 hereunto set my hand this ____ day of
22 _____, 2012.
23
24
25 ERIC J. FINZ

18 (Pages 66 to 67)

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A			
<p>ABC 18:6</p> <p>able 4:24 12:16,17 23:5</p> <p>absolutely 17:3 21:11 44:23</p> <p>abuse 12:8</p> <p>accept 52:3</p> <p>accepted 4:21 34:4,5 34:22</p> <p>access 4:16 9:13 42:7</p> <p>accessed 32:17 44:5</p> <p>accessible 32:11</p> <p>accomplish 9:7 30:19</p> <p>account 13:14</p> <p>act 3:15 5:5 29:15,16 40:3 41:7 48:16 49:21,23 53:2,3,4 55:7 57:23 60:5 64:19</p> <p>acting 15:19</p> <p>actual 36:19,19</p> <p>addressed 19:10 33:15 45:2 52:15</p> <p>adjunct 11:19</p> <p>admit 28:19</p> <p>advances 17:5</p> <p>advertise 28:23</p> <p>advertising 21:12</p> <p>advocating 50:14</p> <p>Aereo 1:11,20 3:21 6:15 8:12 9:2 10:17 13:19 18:16 21:5,7 22:4 23:18,22 24:20 28:16,18 29:9,17,25 31:4,6,8,9,13,15,24 32:15,18 33:8 35:25 36:11 38:11,14,22 40:12 52:18 54:17 55:10,14 56:9 58:4 60:14 61:17 62:16,23 62:24 63:2,14,25 65:18</p> <p>Aereo's 14:5 32:6 63:18,20</p>	<p>affairs 54:9</p> <p>afford 12:16 23:17</p> <p>aggregated 52:11</p> <p>aggregation 52:4</p> <p>agrees 54:17</p> <p>allocable 14:18</p> <p>allow 11:21 12:16,20 16:13</p> <p>allowing 8:10</p> <p>allows 30:16</p> <p>AMERICAN 1:14</p> <p>analogy 23:9,10 24:12 28:8</p> <p>analysis 10:9 11:3,6 28:5 29:19 52:25 53:6</p> <p>analyzing 27:18,20</p> <p>answer 50:21 62:21</p> <p>antenna 10:5 30:12 32:17 36:12,13,18,21 36:23 44:16 47:4,6 47:19,21 48:12 52:7</p> <p>antennas 6:17,19 7:5 9:6,23 10:8 11:24 43:8,12,19 44:13 47:24 48:11,24 49:9 49:20 54:6,25 58:18 61:19</p> <p>anticipate 16:16</p> <p>anymore 51:5</p> <p>apart 14:11</p> <p>APPEALS 1:2</p> <p>appellants 1:9,18 3:12 57:24</p> <p>applied 17:12,16</p> <p>applies 15:22</p> <p>apply 15:17 50:18</p> <p>appreciate 18:2</p> <p>approach 55:3</p> <p>arguably 9:4</p> <p>argue 4:13 65:11</p> <p>argued 9:19 33:19</p> <p>arguing 4:4 22:24 43:9 47:7</p> <p>argument 9:2,16</p>	<p>13:12 15:5 34:23 49:25 50:19 55:12 58:15 60:3</p> <p>arguments 4:19 52:4</p> <p>ASCAP 26:13,13,19 31:19 35:15 37:24 40:20 41:23 42:22,23 45:14,14,22 50:22 57:7,8 58:3 64:24,24 65:6</p> <p>aside 38:11</p> <p>asked 62:22</p> <p>asking 18:15 50:20 53:10 56:23 57:21,22 57:24 58:6,7 62:10</p> <p>aspect 21:5,7</p> <p>assigned 6:5 36:12</p> <p>assistance 3:6 31:24</p> <p>attention 7:19 50:3</p> <p>attorneys 30:5</p> <p>audience 13:10 59:23</p> <p>audience-limiting 27:12</p> <p>authority 17:20</p> <p>authorizes 8:12</p> <p>available 61:20</p> <p>avoid 54:9,14</p> <p>avoidance 54:10</p> <p>avoiding 55:3</p> <p>a.m 66:4</p>	<p>50:23</p> <p>basis 4:20 7:23 11:12</p> <p>beat 63:25</p> <p>believe 43:18 46:16,20 49:21 55:18 56:12</p> <p>belt 55:2</p> <p>benefit 29:18</p> <p>better 48:9</p> <p>big 48:12</p> <p>bigger 23:2</p> <p>bind 15:24 17:20</p> <p>binds 59:13</p> <p>bit 50:8 57:4</p> <p>blanche 12:8</p> <p>blood 67:15</p> <p>bluntly 53:24</p> <p>book 50:7 64:6</p> <p>books 50:6,17</p> <p>bound 17:11,18 53:19</p> <p>bounds 33:25</p> <p>Bowl 21:3,14 22:6 28:21,22 63:24</p> <p>break 29:12</p> <p>brief 62:25</p> <p>broad 10:11 15:17,20 17:3,16 58:22</p> <p>broadcast 3:17,22 4:25 8:6 12:17,21 19:12 21:15 29:2 32:7,8,23 37:6 60:6 60:11 63:20 65:23</p> <p>broadcaster 63:9</p> <p>broadcasters 65:22</p> <p>broadcaster's 52:12</p> <p>broadcasting 1:7,14 1:15,17 20:11 33:9</p> <p>broadcasts 19:9 31:10</p> <p>broken 29:14</p> <p>brought 59:16</p> <p>Bruce 2:17 18:5</p> <p>build 47:24</p> <p>built 54:2,12</p> <p>business 3:21 19:4 49:7 54:8,12</p> <p>businesses 16:14</p>
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